IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 5:11 CR 0170
	)	
Plaintiff,	)	Judge Benita Y. Pearson
	)	
vs.	)	
	)	
ANTHONY D. NORMAN JR., et al.	)	
	)	
Defendants.	)	

GOVERNMENT'S MOTION TO QUALIFY SPECIAL AGENT DANIEL WEHRMEYER, DRUG ENFORCEMENT ADMINISTRATION (DEA), AS AN EXPERT WITNESS PURSUANT TO RULE 702, FEDERAL RULES OF EVIDENCE

Now comes the United States of America, by and through its counsel, Steven M. Dettelbach, United States Attorney, and Samuel A. Yannucci, Assistant United States Attorney, and moves this Court to qualify Special Agent Daniel Wehrmeyer, Drug Enforcement Administration (DEA), as an expert law enforcement witness. By education, training, and experience, Agent Wehrmeyer not only possesses an expertise of the structure of drug trafficking organizations, but also the operating procedures, codes, and language used by drug traffickers to conduct the illegal activity. Agent Wehrmeyer’s specialized knowledge of the practices/language of drug traffickers will assist the trier of fact to understand the evidence - especially conversations intercepted pursuant to court-authorized Title III wiretaps - and determine factual issues herein. SA Wehrmeyer’s intended testimony falls squarely within the ambit of Rule 702, Federal Rules of Evidence.[1]

Further, since Special Agent Wehrmeyer served as a case agent for this investigation from its inception to the present, and in that capacity, supervised the use of traditional investigative techniques, the Title III wiretap, and otherwise personally participated in the investigation, he may also testify as a fact witness. In that event, the government will ask the court to instruct the jury on the “dual roles” of an “expert” and “fact” witness.

The government’s position and supporting authority is more fully set out in the attached Memorandum.

[1] After the final plea deadline has passed, and in accordance with the applicable law, SA Wehrmeyer will prepare and provide to each remaining defendant a written summary of testimony to be offered during the government’s case in chief.

M E M O R A N D U M

A. Authority.

Courts have overwhelmingly found police officers' expert opinion testimony admissible where it will aid the jury's understanding of an area, such as drug dealing, not otherwise within the experience of the average juror. United States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996).

The admission of opinion evidence is governed by Rules 701 through 706 of the Federal Rules of Evidence. Under the rules, a court may admit opinion testimony by both lay and expert witnesses, Fed. R. Evid. 701, 702, and the testimony is admissible even if the opinion "embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a); see also United States v. Brown, 110 F.3d 605, 610 (8th Cir. 1997); United States v. Lipscomb, 14 F.3d 1236, 1239 (7th Cir. 1994); United States v. Allen, 10 F.3d 405, 414 (7th Cir. 1993).

Decisions regarding the admission of evidence, including opinion evidence, lie within the sound discretion of the trial court. United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987). The admission of expert opinion testimony is governed by Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form

> of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The standards for admitting scientific evidence under Rule 702 were addressed by the Supreme Court in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). Daubert was extended to non-scientific expert opinion in Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). In Kuhmo, the Supreme Court held that Daubert's “gatekeeping” obligation applies to the admission of all types of expert testimony identified in Rule 702, including expert testimony concerning “technical” and “other specialized” matters. Id. at 149.

Under Rule 702, formal training or professional education is not a prerequisite to establishing a witness’ expertise. The issue is whether the witness’ knowledge of a particular subject matter is such that his or her opinion will aid the jury in its understanding of the evidence. United States v. Barker, 553 F.2d 1013, 1024 (6th Cir. 1977). In that regard, courts consistently allow qualified law enforcement officers to testify about characteristics of criminal activity as long as appropriate precautionary instructions are given. See e.g., United States v. Swafford, 385 F.3d 1026, 1030 (6th Cir. 2004), citing United States v. Thomas, 99 Fed. Appx. 655, 668-69 (6th Cir. 2004) and United States v. Bender, 265 F.3d 464, 472 (6th Cir. 2001). See also, United States v. Harris, 192 F.3d 580 (6th Cir. 1999); United States v. Flowal, 163 F.3d 956 (6th Cir. 1998); United States v. Thomas, 74 F.3d 676 (6th Cir. 1996).

This is especially true in narcotics prosecutions, where without expert testimony, the average juror is unlikely to understand the coded language used by drug traffickers, the customary pricing, distribution and payment practices, the significance of drug paraphernalia, or appreciate the difference between "street level" dealers and major drug distribution organizations. See Thomas, 74 F.3d at 682; United States v. Pearce, 912 F.2d 159, 163 (6th Cir. 1990).

In the context of narcotics prosecutions, courts have qualified a variety of lay witnesses as experts, including police officers - but also informants, co-conspirators, and drug users. See e.g., United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996) (slang and code words used in recorded conversations); United States v. Bender, 265 F.3d 464, 471-72 (6th Cir. 2001)(holding a police officer with 14 years experience qualified "as an expert on the drug trafficking business and the manufacturing and use of powder cocaine and cocaine base"); United States v. Williams, 81 F.3d 1434 (7th Cir. 1996) (cooperating witness qualified as expert as to meaning of gang codes); United States v. Navarro, 90 F.3d 1245 (7th Cir. 1996) (DEA agent testified as expert concerning operations of drug dealers).

The trial court has wide discretion in determining whether a witness is qualified to offer expert testimony. See e.g., United States v. Stevenson, 6 F.3d 1262 (7th Cir. 1993); United States v. Green, 523 F.2d 229 (2d Cir. 1975); United States v. Trice, 476 F.2d 89 (9th Cir. 1973). In particular, courts routinely allow law enforcement officers, pursuant to Fed. R. Evid. 702, to interpret "drug codes and jargon" at trial. See United States v. Webber, 259 Fed.Appx. 796 (C.A. 6 (Ohio) 2008); United States v. Johnson, 488 F.3d 690 (6th Cir. 2007); United States v. Brown, 872 F.2d 385, 392 (11th Cir. 1989); United States v. Awan, 966 F.2d 1413, 1415 (11th Cir. 1992). See also, United States v. Novaton, 271 F.3d 968 (11th Cir. 2001).[2]

In addition, courts routinely admit opinion testimony on a variety of other issues, including: the methods and operations (modus operandi) of criminal activity, see e.g., United States v. Molina, 172 F.3d 1948, 1056-57 (8th Cir. 1999)(opinion testimony that drug dealers often employ counter surveillance techniques), United States v. Nobles, 69 F.3d 172, 184 (7th Cir.

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[2] Some of the cases cited were decided before the revision to Rule 702, Fed. R. Evid. in 2000; however, some courts nevertheless allowed this type of opinion testimony through Rule 701, Fed. R. Evid. "Opinion Testimony of Lay Witnesses." Under Rule 701, a lay witness may state his or her opinion if: (1) the opinion is rationally based upon the witness' perception, and (2) the testimony would be helpful to the trier of fact in understanding the witness's testimony or determining an issue of fact. United States v. Koon, 34 F.3d 1416, 1430 (9th Cir. 1994); United States v. Rea, 958 F.2d 1206, 1215-16 (2d Cir. 1992).

1995)(expert opinion testimony that defendant was traveling from a source city for drugs, that drug traffickers routinely conduct their business with cash, that pagers are tools of the trade of drug traffickers, and that couriers are crucial to the success of drug trafficking organizations); the "tools of trade" of drug traffickers, see e.g., United States v. Perez, 280 F.3d 318, 342 (3d Cir. 2002)(pagers and cellular telephones), United States v. Navarro, 90 F.3d 1245, 1259-60 (7th Cir. 1996)(cutting agent, plastic baggies and other paraphernalia); the identification of controlled substances, see e.g., United States v. Walters, 904 F.2d 765, 770-71 (1st Cir. 1990), United States v. Schrock, 855 F.2d 327, 332-36 (6th Cir. 1988); the meaning of code words, see e.g., United States v. Saulter, 60 F.3d 270, 276 (7th Cir. 1995), United States v. Rivera, 22 F.3d 430, 434-35 (2d Cir. 1994), United States v. Davis, 787 F.2d 1501, 1505 (11th Cir. 1986); voice identification, see e.g., United States v. Degaglia, 913 F.2d 372, 375-79 (7th Cir. 1990). Moreover, courts have held that lay opinions need not be stated with absolute certainty in order to be admissible. For example, in United States v. Freeman, 619 F.2d 1112, 1120 (5th Cir. 1980), lay witnesses were allowed to testify to their "impressions" and "understanding" of the defendants' relationships to one and other.

Finally, it is not improper for a law enforcement officer to testify as both an expert and fact witness, especially where the jury is instructed by the court, and thus can give proper weight to each type of testimony. Thomas, 74 F.3d at 682-83.

B. Qualifications.

Daniel Wehrmeyer has been a DEA Special Agent for approximately fourteen years. During that time, SA Wehrmeyer has participated in many investigations involving the organized distribution of illegal drugs and has made numerous arrests for drug-related offenses. His experience as a DEA Agent includes, but is not limited to: physical surveillance, analyzing pen register and telephone toll data, interviewing witnesses, drafting and executing search warrants seeking seizure of illegal drugs and other evidence of drug violations, acting in an under-cover capacity to purchase controlled substances, supervising the purchases of controlled substances by undercover agents and informants, debriefing numerous persons arrested and convicted of drug trafficking offenses about their illegal activity, drafting and executing Title III warrants for the interception of wire and electronic communications, and supervising other agents and detectives during Title III investigations.

Through training and experience, SA Wehrmeyer is familiar with the trafficking of cocaine/crack, heroin, marijuana and other controlled substances, the manufacture (processing) of crack cocaine, heroin and marijuana, the prices charged for said substances (as well as other controlled substances) within the

Northern District of Ohio, the profits made by drug dealers and the methods, language, and terms which are used to facilitate and disguise their illegal activity.

In addition, SA Wehrmeyer personally supervised the within investigation, including the court authorized Title III wiretaps. SA Wehrmeyer has considerable experience with Title III investigations and also is the author of the Title III affidavits involved herein.

SA Wehrmeyer's knowledge, training and experience leads him to know that communications related to drug trafficking activity involve the use of coded language during telephone and personal conversations. Drug traffickers almost always use coded language to disguise the true nature of their conversations, and as protection in the event the conversations are being intercepted by investigators. SA Wehrmeyer reviewed ALL intercepted conversations herein, and will authenticate transcripts of selected conversations that the government may use at trial. Finally, after the plea deadline has passed, and the government knows which defendants are likely to proceed to trial, SA Wehrmeyer will prepare and provide to applicable defendants, a written summary of his intended testimony under the rule, including but not limited to his opinion of coded words and jargon used in those conversations, as well as the overall context of the conversations within the manner and methods of the drug trafficking undertaken by the defendants and others.

C. Conclusion.

Based upon the foregoing, the government respectfully requests that the Court declare, pursuant to Rule 702, Federal Rules of Evidence, that SA Wehrmeyer is an "expert" on the manner, means, and language of drug trafficking and permit him to state his opinion on matters pertaining to the operation of drug trafficking organizations including, but not limited to: the structure of the organization, the meaning of intercepted words and jargon used by the defendants and other co-conspirators during intercepted telephone conversations, and the methods and means used by the defendants and others herein to conduct this illegal enterprise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system.

s/ *Samuel A. Yannucci*

Samuel A. Yannucci
Assistant U.S. Attorney